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THE LEGAL STATUS OF OCCUPIED GERMANY*

Max Rheinstein †

THE unprecedented situation presently existing in Germany has, of necessity, given rise to new and intricate questions of international law. Of these, one set of problems appears to me to deserve special attention because of both their theoretical and practical significance, namely, the problems concerning the legal relations between Germany and her occupiers.

An analysis of these problems can best be begun with three observations: first, all Germany is actually occupied by the troops of four foreign nations, the United States of America, the United Kingdom, the Union of Soviet Socialist Republics, and the French Republic; second, Germany does not presently have any government of her own; and, third, on June 5, 1945, the commanders-in-chief of the occupation troops of these powers, as representatives of their respective governments, have declared that the four occupying powers have assumed "supreme authority with respect to Germany."¹

I

STATUS OF GERMANY UNDER INTERNATIONAL LAW

1. *The surrender.* The situation thus characterized has followed the Unconditional Surrender of May 8, 1945. In evaluating the legal significance of that event it is important to keep in mind that there has never been an unconditional surrender of Germany, but only of the German armed forces.² The helplessness following from this act of

* Adapted from Professor Rheinstein's lecture at the University of Michigan Forum on International Law, July 22, 1948.—*Ed.*

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¹ Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics and the Provisional Government of the French Republic, of June 5, 1945, Official Gazette of the Control Council for Germany, Supp. No. 1, p. 7 (1946).

² Act of Military Surrender, of May 8, 1945, Art. 1: "We the undersigned, acting by authority of the German High Command, hereby surrender unconditionally to the Supreme Commander, Allied Expeditionary Forces and simultaneously to the Supreme High Command of the Red Army all forces on land, at sea, and in the air, who are at this date under German control. . . . [signed] v. Friedeburg, Keitel, Stumpf, on behalf of the German High Command." Official Gazette of the Control Council for Germany, Supp. No. 1, p. 6 (1946). See, also, Sauser-Hall, "L'occupation de l'Allemagne par les Puissances Alliés," 3 SCHWEIZ. JAHRB. F. INTL. RECHT 9 at 21-24 (1946).

military surrender enabled the victors not only to dissolve the German government but also to arrest its members and try its head as a war criminal. Until the arrest of Doenitz and his colleagues, Germany had a government which, however, by virtue of foreign *occupatio bellica* and its factual dependency on the occupants, was prevented from functioning in the normal ways of a government.³

2. *Nature of the Occupation.* With the removal of the German government, the Allied occupation changed from *occupatio bellica* into an occupation of a different character, which is not, however, that of an *occupatio pacifica* of the type of the German occupation of France, 1871-1873, or the Allied occupation of the Rhineland, 1920-1930. Neither does it constitute the mere exercise of a right to maintain troops or installations in a foreign country, for instance, the maintenance of the United States bases in the West Indies, or, during the last two wars, the presence of United States troops in the United Kingdom, France and other countries.

According to the clear wording of the basic document, that is, the Declaration of Berlin, of June 5, 1945, Germany also has not been annexed by the occupying powers.⁴

We are thus confronted with an occupation of a peculiar type, which is not entirely identical with, but similar to, that of Bosnia and Herzegovina by Austria-Hungary, 1878-1908, which, in contrast, however, to the unilaterally assumed occupation of Germany, was based upon a treaty with the sovereign of the occupied area.⁵ In some respects the present occupation of Germany may also be likened to the administration of foreign territory by a Power or Prince to whom it has been pledged, a phenomenon which could be found frequently in the Middle Ages and the centuries immediately following, or more closely, to the modern phenomenon of a mandated or trusteeship territory.

³ The legal status of the Doenitz government has become controversial. Dr. Zinn, Minister of Justice of Hesse, has gone so far as to declare the allegation that there once existed a Doenitz government to constitute a "strange political myth." See Zinn, *Unconditional Surrender*, 1 NEUE JURISTISCHE 9 (1947). However, it can hardly be denied that Doenitz and his colleagues, after the announcement of Adolf Hitler's death on May 1, 1945, at least for the first week of May actually exercised general governmental functions in the rapidly shrinking territories still held by German troops, and that, until its dissolution by the Allies on May 23, 1945, the government of Admiral Doenitz continued to exercise those powers of military command which were appropriate to effectuate the surrender of the German armed forces.

⁴ Preamble, ¶ 5: ". . . The assumption, for the purpose stated above, of the said authorities and powers does not effect the annexation of Germany." Official Gazette of the Control Council for Germany, Supp. No. 1, p. 7 (1946).

⁵ Treaty of Berlin, of July 13, 1878, Art. XXV, 69 Br. & For. S.P. 749.

In the Declaration of Berlin of June 5, 1945, which has already been mentioned as the basic document of the occupation, the four occupying Powers state that they have assumed

“ . . . supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal or local government or authority.”⁶

These latter “powers and authorities” were, of course, included in those of the German government, of which the High Command (OKW) was only an agency. The separate enumeration was unnecessary. This statement applies also to the powers of the German states which, through the Law on the Reorganization of the Reich, of January 30, 1934,⁷ had been turned from member states in a federal state into mere administrative subdivisions of the Reich.

3. *The present government of Germany.* He who has assumed all the powers of the German government is the German government. Hence, there exists a German government and this government rests with the four occupying Powers.

There is, consequently, also still a Germany in existence as a separate, not only geographical, but also legal, unit.

4. *Germany as a state.* Is this Germany still a “state” in the sense of international law and in the sense of being a corporate entity?

Of the criteria of a state, Germany has a territory, a population, and a government, although the latter is not of her own making. She is thus to be characterized as a “dependent state,” a state which is, especially, not allowed to maintain foreign relations and which is in this respect similar to a protectorate.⁸

⁶ Preamble, §§ 5, Official Gazette of the Control Council for Germany, Supp. No. 1, p. 7 (1946).

⁷ Reichsgesetzblatt 1934. I. 75.

⁸ In accord as to Germany still constituting a state: Mann, “The Present Legal Status of Germany,” 1 INT. L.Q. 314 at 328 (1947); Jennings, “Government in Commission,” 23 B.Y.B. INT. L. 112 at 120 (1946); Cohn, “Zum rechtlichen Problem Deutschland,” 1 MONATSSCHRIFT FUER DEUTSCHES RECHT 178 (1947); Arndt, “Deutschlands rechtliche Lage,” 1947 DIE WANDLUNG 106; Zinn, “Das staatsrechtliche Problem Deutschland,” 2 SUEDEDEUTSCHE JURISTEN-ZEITUNG 4 (1947); certificate by H. M. Secretary of State for Foreign Affairs, submitted to and accepted by the court in *R. v. Bottrill, ex parte Kuechenmeister*, [1947] K.B. 41, [1946] 1 All Eng. Rep. 635, [1946] 2 All Eng. Rep. 434. Certificate by the President of the Swiss Federal Republic, quoted in Decision Obergericht Zurich, of December 1, 1945, 42 SCHWEIZ. JURISTEN-ZEITUNG 89 (1946), 3 SCHWEIZ. JAHRB. F. INTL. RECHT 204 (1946); Rapport du Conseil federal [Suisse] sur sa gestion en 1945, Department politique, p. 6, 3 SCHWEIZ. JAHRB. F. INTL. RECHT 202 (1946). The opposite opinion, viz., that Germany has ceased to be a state, is being held by Kelsen in his articles “The Legal Status of Germany,” 39 AM. J. INT. L. 518 (1945); “Is a Peace Treaty

Although Germany cannot presently carry on her own foreign relations, she constitutes an international entity figuring in international relations and thus being capable of having rights and duties under international law in general and under treaties in particular.⁹

5. *German property rights under the occupation.* Since Germany has not been "annexed" by her occupants and is still treated by them as a separate unit, she must also still be regarded as a corporate entity capable of having property rights and obligations. The property owned by the Reich or its legally separate subdivisions has not passed to the occupying powers and these powers have not succeeded either to Germany's internal or external debts or other obligations. Neither can it be said that this property has become ownerless or that the debts have *ipso facto* become extinguished. By subsequent acts of the present or some future government of Germany, these property rights and obligations may have been, or may be, transferred to other units, for instance, the newly created Laender. But they have certainly not passed to the occupying powers as their rights or obligations. The German government buildings, schools, or state forests are not owned by the occupants and the occupants are not liable on the German government loans or other debts, old or new.

6. *German nationality under the occupation.* Since there is still a Germany, there are also still members of this international legal unit, that is, German nationals (Staatsangehoerige)¹⁰ and German nationality can still be acquired by naturalization or lost by expatriation, both in accordance with present German law.

II

RIGHTS AND DUTIES OF THE OCCUPYING POWERS

From what has been said, there follows the answer to the problem of the rights and duties of the occupying powers in their relations to Germany, including the much discussed problem of the present sig-

with Germany Legally Possible and Politically Desirable?" 41 AM. POL. SCI. REV. 1188 (1947). Kelsen's argument is based upon the concept of sovereignty. For a discussion of the extensive German literature, see Menzel, "Für voelkerrechtlichen Lage Deutschlands," 2 EUROPA-ARCHIV. 1009 (1947).

⁹ Accord: Austrian Supreme Court, Decisions of January 24, 1946, 68 JURISTISCHE BLÄTTER 142, and of January 28, 1946, 68 JURISTISCHE BLÄTTER 100; Obergericht Zuerich, Decision of December 1, 1945, 1946 SCHWEIZERISCHE JURISTEN-ZEITUNG 89, 1947 DEUTSCHE RECHTSZEITSCHRIFT 31; see also Clark v. Allen, 331 U.S. 503 at 512, 67 S.Ct. 1431 (1947).

¹⁰ Rex v. Bottrill, ex parte Kuechenmeister, [1947] K.B. 41, [1946] 1 All Eng. Rep. 635, [1946] 2 All Eng. Rep. 434. THE AXIS IN DEFEAT, U.S. Dept. of State Pub. No. 2423, pp. 71, 72, 77 (1946); in Luedecke v. Watkins, 335 U.S. 160, 68 S.Ct. 1429 (1948), the continued existence of German nationality was assumed without discussion.

nificance of the rules of the Hague Convention respecting the Laws and Customs of War on Land, of October 18, 1907.

1. *Dual position of occupying powers*

The occupying powers are maintaining in and with respect to Germany a dual position. Qua military victors of World War II they are maintaining their armies of occupation in Germany, a foreign country, conquered by them by force of arms. Simultaneously, however, these very same powers constitute the government of Germany. Obviously the ambiguity of this situation has given rise to unique legal problems.

2. *Rights as military victors*

Although hostilities have come to an end, the Hague Rules, which, by common consent but constitute a restatement of general international law, still fit the present situation in so far as they are concerned with the rights and duties of the army of occupation and the status of the occupation personnel.

According to the traditional view, occupation personnel in foreign territory has an extraterritorial status. Hence, the members of this personnel are not amenable to the German courts, civil or criminal; they are not subject to German taxation, and their conduct is to be judged exclusively in accordance with the laws, and by courts, of their own respective countries. On the basis of the authorities pertaining to them by their own laws, the several commanders may to some limited extent subject members of their personnel to local German laws, for instance, German traffic regulations. For such personnel such laws are binding, however, not qua German law but qua American, British, Soviet, or French law, respectively.

There are no longer applicable, on the other hand, those rules which define one occupant's powers and duties in a situation of active warfare, such as, for instance, the rules contained in Article 44¹¹ or Article 23, paragraph g¹² of the Hague Convention.

But there are still applicable those rules articulated in the Hague Convention which limit the rights of the occupation, qua occupant, to the necessities of occupation, especially those obliging the occupant to respect private property.¹³ Homes may be requisitioned for the purposes of occupation, but not beyond the scope actually necessary, and

¹¹ "A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent or about its means of defense."

¹² Permission to destroy or seize enemy property insofar as "such destruction or seizure be imperatively demanded by the necessities of war."

¹³ Hague Convention of 1907, Art. 46.

only without unnecessary hardship in the process. In no case can private property be confiscated.¹⁴ The American practice to declare the furniture, equipment and other contents of requisitioned homes to be the property of the United States is not in harmony with international law, and international law is flagrantly violated when such furniture, upon termination of its use by the American occupant of the home, is thrown upon the junk heap rather than returned to the German owner.

3. *Rights as government of Germany*

While the rights and powers of the Allies qua occupants are confined within a narrow scope, the rights and powers pertaining to them qua government of Germany are vastly more extensive. In this capacity the occupants have, subject to the far reaching limitations to be discussed below, all the powers which any government may legitimately exercise within its own territory and over its own nationals, including those abroad. These powers include those of legislation, of executive, judicial, and fiscal action, of economic regulation, and of administrative and governmental organization. However extensive, though, these governmental powers may be, they are not unlimited.

The claim of unlimited governmental power is the mark of distinction of totalitarian government—that very form of government against which the war was waged, at least by the Western Allies. The very idea of the absence of any limitation upon governmental powers is contradictory to the political and legal foundations of democracy, particularly as understood in the United States, whose political and legal system is based upon the idea that no government is permitted to encroach upon the “inalienable rights” of “life, liberty and the pursuit of happiness.”

These inalienable rights are now being recognized as guaranteed not only by national but also by international law, especially as the latter has been defined in Nuremberg. When by international law the individual is subject to duties, for the violation of which he is to be held personally responsible, he is, of necessity also entitled to rights.¹⁵ The general scope of these rights is clear; it comprises all those basic human interests the violation of which has been declared to constitute

¹⁴ *Id.*, Art. 46, ¶ 2.

¹⁵ This idea has been forcefully expressed by Zinn in his article on Unconditional Surrender, 1 *NEUE JURISTISCHE* 9 (1947), where he states, at p. 11, that it is “impossible for the individual under International Law to be subject to duties and even to be criminally responsible unless he be also entitled under International Law to corresponding rights.”

crimes against humanity.¹⁶ The accurate definition of the extent to which these various interests are protected by international law may not always be easy; the determination, for instance, of what constitutes due process of law under the peculiar situation of an occupation is difficult, just as it is a delicate task accurately to determine the permissible scope of censorship, the permissible limitations of the right of arrest and detention or the permissibility of retroactive punishment for National-Socialist activities.

The delicate task of such detailed determination may well devolve one day upon a court, international or national, in a case or cases which may conceivably be brought against an occupant country or against an individual member of the occupying forces or administrations. In such cases, the court would have to proceed upon the basis of the principles elaborated in Nuremberg, including the non-availability of the defense of superior orders, and, in addition, the court might also have to apply general principles of civil liability for tortious acts.

4. *Fiduciary duty of the occupying power*

a. *Basis of fiduciary duty.* Having assumed supreme authority with respect to Germany, a country having no government able to speak for herself and her people, the occupants are finding themselves in a fiduciary position. Fiduciary duties are well recognized already in international law even for a belligerent occupant.¹⁷ The existence of

¹⁶ See Charter of the International Military Tribunal, Art. 6: ". . . The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: . . .

"(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated." I INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS II (1947).

The *ius singulare* of the Nuremberg Charter has been expanded into general law "in Germany" by Control Council Law No. 10, of December 20, 1945, Official Gazette for the Control Council for Germany, No. 3, p. 51 where "crimes against humanity" are defined in Art. II.I. c as follows: "Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

¹⁷ See in this respect, especially, Hague Convention of 1907, Art. 43, which declares that the occupant has the duty "to take all measures in his power to restore, and ensure, as far as possible, public order and safety"; or Hague Convention of 1907, Art. 55, dealing with the occupant's duty to "safeguard the capital of these [public] properties, and [to] administer them in accordance with the rules of usufruct."

far-reaching fiduciary duties is recognized to be incumbent upon countries exercising powers not only over the inhabitants of trusteeship territories, but over all dependent peoples. The German people is at present a dependent people and as such is entitled to the observance of fiduciary duties by its guardian powers.¹⁸

b. *Elements of fiduciary duty.* The fiduciary position of the occupants implies, among others, a duty to preserve the capital assets of the German economy, to restore the productive capacity of the country, to provide for an efficient and clean administrative machinery, to preserve Germany's cultural identity, to reintegrate the German people into the economic and cultural world community, and to prevent disease and starvation. In the present food situation of Germany the importation by the occupants—practically, that means the United States—of food into Germany is not simply an act of charity or generosity but the fulfillment of a duty of international law, which is part of the general duty of an occupant, even a belligerent one, to restore and maintain law and order in the occupied territory. The fulfillment of this duty has repeatedly been claimed of Germany by Allied Powers, when Germany found herself in the position of occupant. During the first World War the Allies declared Germany's responsibility for the proper feeding of the population of occupied Belgium and, being physically

¹⁸ Cf. the following statements contained in the decision of the Obergericht (Appellate Court) of Zurich, of 1 December 1945, 42 SCHWEIZERISCHE JURISTEN-ZEITUNG 89 (1946), 3 SCHWEIZ. F. INTL. RECHT 204 (1946): "The trial court properly observed that international law has been developed for the very purpose of preventing the occurrence of a complete chaos. This idea has found expression, for instance, in Art. 43 of the Hague Convention concerning the Laws and Usages of War on Land. . . . Since international law prevents an occupation from resulting in a legal vacuum, and since, on the other hand, there having not occurred an annexation, the supreme authority is not that of the conquerors, it follows that the occupying powers, by virtue of international law, are exercising German state authority. . . . The state of affairs presently existing in Germany corresponds most closely to a kind of fiduciary administration [treuhaenderische Verwaltung] of the authority of the German state by the occupying powers. . . ." The court concluded that there was still in effect, therefore, a certain treaty between Germany and Switzerland, by which German plaintiffs in Switzerland are to be exempt from duty to provide security for costs. See, also Sauser-Hall, "L'occupation de L'Allemagne par les Puissances Alliées," 3 SCHWEIZ. JAHRB. F. INTL. RECHT 9 (1946), where, likewise, the Allied occupation of Germany is characterized, at p. 36, as "une occupation *sui generis* résultant de la fiducie [trust]"; cf., furthermore, Menzel, "Zur voelkerrechtlichen Lage Deutschlands," 2 EUROPA-ARCHIV 1009 (1947); von Kempser, "Deutschland als Voelkerrechtsproblem," 1 MERKUR 188 (1947) ("une mission sacrée de la civilisation"), and Abendroth, "Die Haftung des Reiches, etc., fuer Verbindlichkeiten, die vor der Kapitulation vom 8. Mai entstanden sind," 1 DIE NEUE JUSTIZ 73 (1947).

For a discussion of the extensive German literature, see Menzel, "Zur Voelkerrechtlichen Lage Deutschlands," 2 EUROPA-ARCHIV 1009 (1947).

unable to fulfill this duty out of her own depleted resources, Germany, during that war consented to the establishment of an international Relief Organization for Belgium and, during the present war to the importation of food into occupied Greece and the British Channel Islands.¹⁹

The statement of the occupant's duty to take care of the adequate food requirements of the German population does not exclude the existence on the German side of a moral duty of gratitude. The promptness and generosity with which the United States has acted in the fulfillment of her duty to prevent the outright starvation of the population of Western Germany constitutes an attitude which, unfortunately, has not always been evident in these present times. On the other hand, self-righteousness on the American side should not conceal the fact that the food importations into Germany have still not been sufficient to prevent severe general malnutrition.

c. *Effect of Unconditional Surrender on fiduciary duty.* The various fiduciary duties, enumerated or to be further implied, have not been superseded by the "Unconditional Surrender" which, as it must be emphasized again, was not of Germany but only of the German armed forces.²⁰ As a matter of fact, this very unconditional surrender and the ensuing helplessness of Germany are the basis for the existence of the occupants' fiduciary duties.

The fact that the Unconditional Surrender was not meant to wipe out all rights of the German people and its individual members, is also evident from the reiterated pronouncements of the leading statesmen of the Allies, as well as from the innumerable statements made in leaflets or over the radio, in the course of the Allied psychological warfare. Of the major documents, only two ought to be mentioned here, namely, the Report on the Crimean Conference, of February 11, 1943, and the Report on the Potsdam Conference, of August 2, 1945. In the first, President Roosevelt, Prime-Minister Churchill, and Marshall Stalin declared:

"It is not our purpose to destroy the people of Germany. . . ." ²¹

The same solemn pledge was repeated in the second when Marshall Stalin, President Truman and Prime-Minister Attlee declared:

¹⁹ See T. HEYMANN, *BESATZUNGSRECHT* 20 (1920); Meurer, 33 *ARCH. F. OEFFENTL. R.* 393; E. SAUER, *GRUNDLEHRE DES VOELKERRECHTS* 239 (1947); Zinn, *Unconditional Surrender*, 1 *NEUE JURISTISCHE* 9 at 13 (1947).

²⁰ See *supra*, note 2.

²¹ Official Gazette of the Control Council for Germany, Supp. No. 1, p. 4 (1946).

"It is not the intention of the Allies to destroy or enslave the German people."²²

5. *Performance of fiduciary duty as affected by Allies' position as victors*

The proper performance of the occupants' fiduciary duties is jeopardized by the occupants' simultaneous position as victors in the war. The political realities make it clear that it has not been the primary purpose of the Allied occupation of Germany to bestow benefits upon the German population. The victors went into Germany and have been staying on there in order to safeguard their own interests.

These interests of the Allies as victors are not easy to reconcile with the Allies' fiduciary position as the government of Germany. The incompatibility of positions of antagonistic interest has long been recognized in the private law of all civilized nations, which consistently tries to prevent such situations and prohibits the self-dealing of trustees, guardians, administrators, executors, and other fiduciaries. The dangers generally inherent in such a situation are aggravated in the case of the Allied occupation of Germany by the emotional effects of the National-Socialist crimes and the war and the feelings of passion and vindictiveness thereby engendered. They are not made easier by the acute economic rivalry in which at least some of the occupants are finding themselves engaged with Germany.

6. *Need for a genuine German government*

The best solution of the occupants' dilemma caused by their dual position would consist in the earliest possible termination of the present state of affairs. Indeed, in the basic documents, the Declaration of Berlin, of June 5, 1945 and the Report of the Potsdam Conference, the present regime of Germany is clearly characterized as a mere interim solution.²³ One may even go so far as to say that this present state of affairs, which may have been initially inevitable under existing circumstances, becomes illegal when it is prolonged beyond the period of necessity. The ambiguity and intrinsic contradictoriness of the situation, not to speak at all of political wisdom, requires the earliest pos-

²² Official Gazette of the Control Council for Germany, Supp. No. 1, p. 14 (1946).

²³ See Declaration of Berlin, preamble, ¶ 3, Official Gazette of the Control Council for Germany, Supp. No. 1, p. 7 (1946), and (Potsdam) Report on the Tripartite Conference, Part III, preamble, id., p. 14.

sible creation of a genuine German government, which is to be capable of speaking for the German people and which will be recognized by them as their true representative.

If occupation as such should continue to be a political necessity, it is imperative that it be converted from the present *occupatio ambivalens* into a regular *occupatio pacifica*. The present status of Austria is indicative of what might be done in Germany, although the Austrian situation, too, is far from being free from dangerous ambiguities. When the occupation is being established upon the clear pattern of *occupatio pacifica*, its details must be spelled out in a treaty between the occupants and the new German government, which must also provide for the impartial adjudication of controversies which may arise both as between the occupants and Germany, and among the occupants themselves.

Until such an Occupation Charter has been agreed upon, the occupants will have to be motivated by the utmost moderation and by a continuous and clear recognition of their moral and legal responsibility as fiduciaries for Germany and her people.

7. *Reconciliation of contradictory tasks by convergent interests*

The reconciliation of the two apparently contradictory tasks of the occupation is to some extent facilitated by the actually existing convergence of interests of at least the Western Allies and Germany. Not only the Germans but also we are interested in preventing Germany from further deteriorating physically and economically and thus becoming an even more dangerous center of infection. For a variety of reasons we are interested in Germany's economic rehabilitation and, of course, in the cultivation of her democratic forces, which cannot flourish in a state of chaos. However, German and Allied interests are not, or at least do not always appear to be, identical, especially where there exists rivalry in the world market. The present situation holds a dangerous temptation for the occupants to profit at the expense of their German ward through the continuation of the present trade controls, the shipping restrictions, the forced repatriations, the liquidation of the German foreign assets, and the continued appropriation and expropriation of German patents, copyrights and other German industrial property. Such profiteering jeopardizes not only the present and future reputation of the Allies but their very own moral standards.

The dangers of the present ambiguous situation are, furthermore, increased by prejudices and misconceptions existing with relation to German history, cultural tradition and education, with respect to the

historical forms of expression of the liberal and democratic forces of Germany, and by those errors concerning National-Socialism which have resulted in our fateful mishandling of denazification.

III

GOVERNMENTAL MACHINERY ESTABLISHED IN GERMANY

While we have tried to deal extensively with the problem of locating and defining supreme governmental power presently existing with respect to Germany, we shall have to be brief in our discussion of the machinery established by the present holders of this supreme power.

1. *Regions annexed by Hitler*

From the territory of Germany as constituted at the beginning of the occupation, the occupants have severed certain regions, namely, all those which did not belong to Germany before the beginning of the Hitlerite expansion, that is, Austria, Sudetenland, Bohemia-Moravia, Memel, Danzig, the former Polish territories annexed by Germany (Corridor, Suwalki, Lodz, and Bialystok), Eupen-Malmédy, Luxemburg, Alsace-Lorraine, and certain territories taken away from Yugoslavia (Maribor) and Italy (Bolzano and Trieste).

The German annexations accomplished after September 1, 1939 have never been recognized by the Allies, and their undoing can thus be regarded simply as liberation of non-German territory. As to the other regions, especially Austria and Sudetenland, the question arises whether the separation was made by the occupants qua foreign victors or qua government of Germany or in both capacities. For the moment, that question seems to be irrelevant, but it should be regularized in the peace treaty.

2. *Pre-1938 Germany*

For the territory of Germany as constituted before 1938, different regimes have been established for different regions.

a. *Northern East Prussia.* With respect to the Northern part of East Prussia, including the City of Koenigsberg, there has been recognized in the Potsdam Declaration the claim of the Soviet Union to the future acquisition of this territory and to the Soviet Union's immediately establishing in it its own administration, subject to future determination of the details of the border.²⁴

²⁴ Report on the Tripartite Conference, of August 2, 1945, Part VI: "The Conference examined a proposal by the Soviet Government that pending the final determination of territorial questions at the peace settlement, the section of the western

b. *East of the Oder and Neisse.* With respect to the other territories of Germany east of the rivers Oder and Neisse, including the Southern part of East Prussia, the Potsdam Powers consented to their immediate subjection to administration by the Polish State. "For such purposes" and it ought to be noted, for such purposes *only*, "these regions shall not be considered part of the Soviet Zone of occupation in Germany."²⁵ The wording of the relevant passage of the Potsdam Report makes it clear that the regions in question, including those placed under Soviet administration, have not yet been detached from Germany, that they still form a part of the Soviet Zone of Occupation, and it would seem to follow that the postulate of the farthest possible uniform treatment of all four zones of occupation²⁶ ought to be applicable to these regions, too. It should also be apparent that the fiduciary duties of the Allies exist not only with respect to what may

frontier of the Union of Soviet Socialist Republics which is adjacent to the Baltic Sea should pass from a point on the Eastern shore of the Bay of Danzig to the east, north of Braunsberg-Goldap, to the meeting point of the frontiers of Lithuania, the Polish Republic, and East Prussia.

"The Conference has agreed in principle to the proposal of the Soviet Government concerning the ultimate transfer to the Soviet Union of the City of Königsberg and the area adjacent to it as described above, subject to expert examination of the actual frontier.

"The President of the United States and the British Prime Minister have declared that they will support the proposal of the Conference at the forthcoming peace settlement." Official Gazette of the Control Council for Germany, Supp. No. 1, pp. 16, 17 (1946).

²⁵ Report on the Tripartite Conference, of August 2, 1945, Part IX b: "The following agreement was reached on the western frontier of Poland.

"In conformity with the agreement on Poland reached at the Crimea Conference, the three Heads of Government have sought the opinion of the Polish Provisional Government of National Unity in regard to the accession of territory in the north and west which Poland should receive. . . . The three Heads of Government reaffirm their opinion that the final delimitation of the western frontier of Poland should await the peace settlement.

"The three Heads of Government agree that, pending the final determination of Poland's western frontier, the former German territories east of a line running from the Baltic Sea immediately west of Swinemünde, and thence along the Oder river to the confluence of the Western Neisse river and along the western Neisse to the Czechoslovak frontier, including that portion of East Prussia not placed under the administration of the Union of Soviet Socialist Republics in accordance with the understanding reached at this Conference and including the area of the former free city of Danzig, shall be under the administration of the Polish State and for such purposes should not be considered as part of the Soviet Zone of occupation in Germany." Official Gazette of the Control Council for Germany, Supp. No. 1, pp. 17 and 18 (1946).

²⁶ Report on the Tripartite Conference of August 2, 1945, Part III, Agreement, § 2: "So far as is practicable, there shall be uniformity of treatment of the German population throughout Germany." *Id.*, p. 14.

be called, or at least could be called until recently, Control Council Germany, but also apply to the regions provisionally placed under Soviet and Polish administration. It would also seem to follow that the responsibilities implied in the occupants' fiduciary status are incumbent upon all of them jointly even with respect to those regions for which they have deemed it fit to entrust the administration to the Soviet Union or Poland alone. Both the Soviet Union and Poland have used their administrative powers in the regions entrusted to their provisional administration, among others, to expel therefrom all persons of German origin. The number of persons treated in this barbaric way amounts to several millions.²⁷ It ought to be emphasized that this measure does not find any basis in that part of the Potsdam Report in which "the three Governments" alleging, at least, to have "considered the question in all its aspects, recognize that the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken."²⁸ Since East Prussia and Silesia have not become parts of Poland, the expulsion of all Germans from these regions cannot be justified by the provision just quoted. Considering the measure by itself, and in particular the way in which it has been carried out, it cannot be called anything but a crime against humanity in the full sense and with all the implications of the term as determined in Nuremberg.²⁹

3. *The Saar Basin*

In the West, France has seen fit to detach from her Zone of Occupation and to integrate with her own economy the territory of the Saar, with an area considerably larger than that of the Saar Territory established after the First World War.³⁰ The United States and

²⁷ The pre-war population of the regions in question was in excess of 7,000,000. Of these less than 10 per cent were non-German and thus not subject to deportation. In addition to the Germans expelled from the German territories provisionally placed under Polish and Soviet administration by virtue of the Potsdam decisions, there were expelled into Germany at least 2,000,000 Germans from Poland proper, Czechoslovakia, Austria, and Hungary as well as an as yet unknown number of Germans forcibly "repatriated" from the various United Nations. In the plan approved by the Control Council on November 20, 1945 the number of Germans to be removed from Poland (including the German territories under Polish administration), Czechoslovakia, Austria and Hungary was determined at 6,500,000. This figure does not include those Germans who had already fled in anticipation of expulsion and those to be repatriated from other allied countries.

²⁸ Report on the Tripartite Conference, Part XIII, Official Gazette of the Control Council for Germany, Supp. No. 1, p. 19 (1946).

²⁹ See *supra*, note 16.

³⁰ October and December, 1946.

the United Kingdom seem to have acquiesced in this measure.³¹ As long as it has not been recognized by all the occupants, it cannot be regarded as legal.

4. *The major part of Germany*

The major part of Germany has, as it is generally known, been placed under the general governmental machinery of the Control Council. As it is also well known, the machinery thus established has to all practical effects, broken down. However, the interest in its legal analysis is more than merely academic. It must be clearly recognized in order to determine present legal disputes.

In the basic Declaration of Berlin, of June 5, 1945, as confirmed by the Potsdam Report, of August 2, 1942, the four Occupying Powers have assumed supreme authority with respect to Germany jointly.³² The situation is similar to that commonly referred to as condominium such as it exists, for instance, in the Anglo-Egyptian Sudan or in the New Hebrides. However, since Germany has not been annexed by the powers by which she is governed, the situation has more correctly been called one of co-imperium,³³ similar to that which existed after the First World War under the joint Allied occupations of Fiume and Memel.

The functions of the Control Council and the Zone Commanders are defined in the Statement of Berlin, of June 5, 1945, in which these functions are declared to be limited to "supreme authority in Germany."³⁴ It follows that supreme authority with respect to Germany's external affairs has been reserved by the Occupying Powers to themselves.³⁵ This general situation does not prevent them from jointly delegating certain aspects of Germany's foreign relations to the control machinery in Germany. Such a measure was taken, for instance, by the Potsdam Conference with respect to the external assets of Germany, for the control and disposition of which the Control Council was charged to take steps.³⁶

³¹ Moscow Conference, March/April, 1947.

³² See *supra*, note 6.

³³ Mann, "The Present Legal Status of Germany," 1 INT. L.Q. 314 at 330 (1947).

³⁴ Official Gazette of the Control Council for Germany, Supp. No. 1, p. 10 (1946).

³⁵ See Mann, "The Present Legal Status of Germany," 1 INT. L.Q. 314 at 319 (1947).

³⁶ Report on the Tripartite Conference, Part III, Agreement, § 18, Official Gazette of the Control Council for Germany, Supp. No. 1, p. 16 (1946). The mandate was carried out by Control Council Law No. 5, of October 30, 1945, Official Gazette of the Control Council for Germany, No. 2, p. 27.

With respect to the exercise of supreme authority in Germany, the basic documents have been using the following well-known language: Such authority "will be exercised, on instructions from their Governments, by the British, United States, Soviet and French Commanders-in-Chief, each in his own Zone of occupation, and also jointly, in matters effecting Germany as a whole."³⁷ This latter phrase is obviously ambiguous. Does it mean that authority to act with respect to those problems which objectively affect Germany as a whole is vested in the Control Council alone and to the exclusion of the Zone Commanders, or does the power of the Zone Commanders extend to all those affairs upon which the Control Council has not expressly and unanimously agreed that they affect Germany as a whole, irrespective of whether or not such affairs objectively affect Germany as a whole? If the former interpretation were to be applied, the entire governmental machinery had immediately found itself stymied, especially in consequence of the long-maintained negative position of France. Practical necessities and usage have decided in favor of the second interpretation, with the result that the scope of affairs actually handled by the Control Council has been shrinking continuously and been reduced to zero at the present time. If the former interpretation were maintained, it would mean that all the matters taken by individual Zone Commanders would be legally ineffective if they would affect Germany as a whole. The consequences would be enormous. Let us just think of the recent currency reforms, the land reform of the Soviet Zone, and the innumerable amendments of former uniform German laws by Allied Zonal authorities or German local agencies acting under their authority.

5. *Berlin*

With respect to Berlin, the statement of June 5, 1945 says clearly:

"The administration of the Greater Berlin area will be directed by an Inter-Allied governing Authority which will operate under the general direction of the Control Council. . . ."³⁸

How it can be maintained that Berlin constitutes a part of the Soviet

³⁷ Statement by the Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics and the Provisional Government of the French Republic on Control Machinery in Germany, of June 5, 1945, Section 1, Official Gazette of the Control Council for Germany, Supp. No. 1, p. 10 (1946); Report on the Tripartite Conference, Part III, Agreement, § 1, *id.*, p. 14.

³⁸ Section 7, Official Gazette of the Control Council for Germany, Supp. No. 1, p. 10 (1946).

Zone of occupation³⁹ is hard to understand in the light of this provision, which is not only clear on its face but is also distinguished from the provisions relating to the Four Zones of Occupation by its very position within the text of the Statement of June 5, 1945.

6. *The Laender*

Within their several Zones the Occupying Powers have, as it is well known, established a number of so-called states or *Laender*. Even though these "states" have been established with great solemnity and have adopted for themselves elaborate "constitutions,"⁴⁰ they cannot legally be regarded as anything but administrative subdivisions within the present governmental framework of Germany, endowed, it is true, with a considerable amount of self government, which can be reduced or recalled, however, at any moment by the holder of supreme governmental authority.

IV

CONCLUSION

To many readers the statements made here may appear to be far removed from political realities. However, let us remember that we are here concerned, not with International Affairs, but with International Law. While it must be conceded, of course, that law cannot be conceived of in separation from the facts and realities of life, we must not fall into the error of maintaining that law must always and inevitably follow the facts. Quite the contrary, law is, by its very essence, a standard for human conduct, that very conduct by which the facts are being created, and which may, and often does, fall short of the law. But the rules of law still remain in effect. We lawyers, especially in the field of international law, have often claimed that we are the keepers of the conscience of the community and its statesmen. If we wish to maintain this claim we must insist that state conduct be based on international law, and that international law be based upon the morals and the conscience of mankind. It is for these ideals that this war has been fought. If there ever has been a just war, it was this. If we deviate from the law, or if we allow the law to deviate from morality, we betray the very end for which the untold sacrifices have

³⁹ Mann, "The Present Legal Status of Germany," 1 INT. L.Q. 314 at 318, note 18 (1947).

⁴⁰ These constitutions are collected in Office of Military Government for Germany (U.S.), Civil Administration Division, Constitutions of the German *Laender* (1947); for a summary of the constitutions of the *Laender* of the United States Zone, see Rheinstein, "German Law in Transition," 1 COMMON CAUSE 301 (1948).

been made, and we betray the hopes of mankind for a better future. These hopes of mankind have hardly ever been more eloquently stated than in a document which sometimes now seems to have fallen into oblivion, namely, the Atlantic Charter. Let us remember that solemn document:

“The President of the United States of America and the Prime Minister, Mr. Churchill; representing His Majesty’s Government in the United Kingdom, [have deemed] it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future of the world . . . they respect the right of all peoples to choose the form of government under which they will live; . . . they will endeavor . . . to further the enjoyment by *all* States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world; . . . they desire to bring about the fullest collaboration between *all* nations in the economic field . . . [and] after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in *all* the lands may live out their lives in freedom from fear and want.”⁴¹

This quotation may sound like a reminiscence from ancient history. I, at least, believe that it is not too late to revert to the principles thus stated.

⁴¹ INT. CONCILIATION No. 372, p. 593 at 595, 596 (1941).